NO. 91-1150

FILED
FEB 14 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

JAMA CONSTRUCTION CORPORATION, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, et al.,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

JAMES K. HAHN, City Attorney
PATRICIA V. TUBERT, Deputy City Attorney
SUSAN D. PFANN, Deputy City Attorney*
200 North Main Street
Room 1700, City Hall East
Los Angeles, California 90012
(213) 485-6393

*Counsel of Record

Lorraine Mitchell Legal Briefs

732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021-3088
(213) 747-5631 • FAX: (213) 747-5943

CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT OF JURISDICTION	3
STATEMENT OF THE CASE	4
ARGUMENT	9
I. INTRODUCTION	9
II. THE NINTH CIRCUIT CORRECTLY DETERMINED THAT PETITIONER'S TAKINGS CLAIM WAS NOT RIPE FOR DECISION BECAUSE PETITIONER HAD NOT SOUGHT AND BEEN DENIED JUST COMPENSATION IN STATE COURT . .	10
A. Petitioner Could Have, But Did Not, Seek Compensation in State Court	10
B. The Ninth Circuit Opinion Does Not Preclude Federal Review of Takings or Due Process Claims	13
III. THE NINTH CIRCUIT OPINION PRESENTS NO CONFLICT WITH EXISTING OPINIONS	15
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 24 Cal.3d 266, 598 P.2d 25, aff'd on other grounds 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) 11

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed. 2d 250 (1987) 2, 8, 10, 11, 12

Norco Construction, Inc. v. King County, 801 F.2d 1143 (9th Cir. 1986) 15, 16

Rossco Holdings, Inc. v. State of California, 212 Cal.App.3d 642, 659-660, 260 Cal.Rptr. 736 (1989), cert. denied, ____ U.S.____, 110 S.Ct. 1809, 108 L.Ed.2d 940 (1990) 11-12, 14

Sinaloa Lake Owners Association v. City of Simi Valley (9th Cir. 1989) 882 F.2d 1398, 1404, cert. denied, ____ U.S.____, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990) . . 8, 15, 16

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 26 (1985) 3, 6, 7, 10, 12, 15

TABLE OF AUTHORITIES

Page

STATUTES AND REGULATIONS

UNITED STATES CONSTITUTION
Fifth Amendment 3, 5

FEDERAL LAWS

28 U.S.C.
Section 1257 14
Section 1983 . . . . . 2, 6

STATE LAW

California Government Code
Section 5.1. 12

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

JAMA CONSTRUCTION CORPORATION, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, et al.,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

QUESTION PRESENTED

Petitioner sought a writ of mandate in state court to compel approval of its development project, alleging that

Respondent City improperly required an environmental assessment of the project impacts under state law. Petitioner also sought damages for the delay caused by the City's requirement. The trial court granted the writ.

Damages for Fifth Amendment temporary regulatory takings are recoverable in a state court proceeding. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed. 2d 250 (1987). California has a statutory procedure for pursuing damage claims for alleged takings. Nevertheless, petitioner abandoned its damages claim in the state trial court and instead brought an action in federal district court under 28 U.S.C. Section 1983 based on the same facts, claiming a regulatory taking without just

compensation under the Fifth Amendment to the United States Constitution.

The question presented is:

Whether an action for just compensation under the Fifth Amendment may be maintained in federal court where petitioner has neither pursued nor been denied compensation under available procedures in state court.

STATEMENT OF JURISDICTION

The decision of the Court of Appeal that it had no jurisdiction under Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) is correct and should not be further reviewed. Respondent received the Petition for Writ of Certiorari

on January 15, 1992, and is timely filing this Brief in Opposition to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

In June, 1989, Petitioner filed a complaint and petition for writ of mandate in the Los Angeles Superior Court against Respondent the City of Los Angeles, alleging that Respondent improperly delayed its development project by requiring an environmental impact report. The acts of which petitioner complained occurred not earlier than 1988. Opinion of Ninth Circuit Court of Appeal, Appendix A to Petition, at page 9, fn. 2.[1]

---

[1]References to "lettered" appendices are to appendices attached to the petition for writ of certiorari.

Petitioner's state court action sought a writ of mandate, declaratory relief, and damages. Answering Brief of Appellees in Ninth Circuit Court of Appeal, dated September 28, 1990, at pages 10-1C.1. The trial court granted the writ of mandate. Petitioner did not further pursue its damages claim in state court, but instead brought an action in federal district court, alleging that Respondent's actions in delaying its development permit constituted a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution, and seeking damages. The federal complaint did not specifically allege a due process violation.

The District Court found that the wrongs alleged in the federal case involved the same "primary rights" as the wrongs alleged in the state case, and that since petitioner could have, but did not, pursue its damages claims in state court, the federal action was barred by res judicata as determined by state law. Appendix B, page 5, fn. 2, and pages 7-8.

Petitioner's brief to the Ninth Circuit attacked the District Court ruling, and for reasons not entirely clear, cited the Williamson case while acknowledging that Section 1983 claims for Fifth Amendment takings damages could be pursued in state court. Appellant's Opening Brief to Ninth Circuit, dated August 31, 1990, at pages 14-

15.[2] Respondent's Brief countered that the takings claim was not ripe under Williamson, since petitioner had not been denied just compensation. Respondent's Brief in Ninth Circuit, dated September 28, 1990, at pages 16-17.

Petitioner raised the alleged due process violation for the first time in its Reply brief to the Ninth Circuit. Appendix A, page 6, fn. 1.

The Ninth Circuit determined that since petitioner had not sought and been denied just compensation for the alleged taking in state court, the action was not ripe for decision under Williamson, and should be

---

[2]Petitioner incorrectly suggests that the Ninth Circuit deprived it of an opportunity to brief the Williamson issue (petition, page 6, fn. 5); petitioner first cited the case in its opening brief.

dismissed for lack of subject matter jurisdiction, citing Sinaloa Lake Owners Association v. City of Simi Valley (9th Cir. 1989) 882 F.2d 1398, 1404, cert. denied, ____ U.S.____, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990). Appendix A, page 8. Since the alleged taking occurred after First English required payment of damages in California for regulatory takings, the Ninth Circuit held the "ripeness" requirement was not "futile", citing Sinaloa Lake Owners Ass'n, at page 1402. Appendix A, page 8 and fn. 2.

To the extent petitioner's federal action raised a due process claim, the Ninth Circuit held it barred by res judicata. Appendix A, page 6-7, fn. 1.

ARGUMENT

I.

INTRODUCTION

Petitioner attempts to persuade this court that the Ninth Circuit opinion deserves review by mixing the related but separate requirements of Fifth Amendment takings and due process claims, and by confusing the requirement for "ripeness" in takings claims with the doctrine of res judicata as applied to all claims. Petitioner misstates the record, and the law.

II.

THE NINTH CIRCUIT CORRECTLY DETERMINED THAT PETITIONER'S TAKINGS CLAIM WAS NOT RIPE FOR DECISION BECAUSE PETITIONER HAD NOT SOUGHT AND BEEN DENIED JUST COMPENSATION IN STATE COURT.

A. Petitioner Could Have, But Did Not, Seek Compensation in State Court

The Ninth Circuit correctly determined that petitioner's failure to pursue its takings claim for damages in state court rendered its federal action unripe under Williamson, since petitioner had not sought and been denied just compensation.

Petitioner's argument that there was no state court remedy is incorrect. Prior to the Supreme Court decision in First English,

California law precluded a landowner from seeking the remedy of damages in an inverse condemnation action for a temporary regulatory taking. Agins v. City of Tiburon, 24 Cal.3d 266, 598 P.2d 25, aff'd on other grounds 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). In First English, the Supreme Court held that a landowner was entitled to damages for a regulatory taking.Since petitioner's cause of action arose after the decision in First English, the Ninth Circuit correctly determined in this case that petitioner was not excused from first seeking compensation in state court before pursuing its federal action. Appendix A, page 8-9, fn. 2.

Petitioner's argument that no state procedures exist to pursue this remedy also misstates the law. In Rossco Holdings, Inc.

v. State of California, 212 Cal.App.3d 642, 659-660, 260 Cal.Rptr. 736 (1989), cert. denied, ____ U.S.____, 110 S.Ct. 1809, 108 L.Ed.2d 940 (1990), decided after First English, the state court held that an action for inverse condemnation may be procedurally joined with an administrative mandamus action, and that no showing had been made that such a procedure would be ineffective.[3]

Since state procedures and remedies for seeking and recovering compensation for regulatory takings existed at the time of the alleged taking, the Ninth Circuit correctly determined the federal action was not ripe under Williamson.

---

[3]In fact, such actions are expedited in California, with no requirement for prior presentation and rejection of a claim to the local agency. California Government Code section 5.1. Appendix 1.

B. **The Ninth Circuit Opinion Does Not Preclude Federal Review of Takings or Due Process Claims.**

Petitioner implies that the Ninth Circuit opinion would completely preclude Fifth Amendment takings (or due process) claims from federal review under the doctrine of res judicata. Petition, pages 15-16.

The Ninth Circuit did not determine that petitioner's takings claims were barred in federal court by the doctrine of res judicata; it held them unripe. Appendix A, page 6. Even if the Ninth Circuit had held that petitioner's takings claims were barred by res judicata (as the District Court had, Appendix B), that decision would not support petitioner's proposition that regulatory

takings claims are never federally reviewable in California.

Petitioner could have pursued its federal constitutional claims in its state court action. Rossco Holdings, Inc. v. State of California 212 Cal.App.3d 642, 659-660, 260 Cal.Rptr. 736 (1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1809, 108 L.Ed.2d 940 (1990). Had petitioner pursued its takings claims in state court, properly raised the federal constitutional issues, and been denied compensation by a final decision of the state court of last resort, petitioner could have sought review of the federal takings issues by this Court under 28 U.S.C. Section 1257. Similarly, had petitioner pursued and properly preserved its due process claims in state courts, federal review would be available under the

same procedure.[4] Therefore, further review of this case is unwarranted.

III

THE NINTH CIRCUIT OPINION PRESENTS NO CONFLICT WITH EXISTING OPINIONS

Petitioner asserts that the Ninth Circuit opinion holding its due process claims barred by res judicata conflicts with two Ninth Circuit opinions: Norco Construction, Inc. v. King County, 801 F.2d 1143 (9th Cir. 1986) and Sinaloa Lake Owners Association v. City of Simi Valley, 882 F.2d

---

[4]The Ninth Circuit, in holding petitioner's late asserted due process claims barred under res judicata, recognized that the ripeness requirement described in Williamson did not apply to petitioner's due process claims, citing Sinaloa. Appendix A, page 7, fn. 1.

1398 (9th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990).

As explained in the District Court opinion, Norco is factually distinguishable, since it involved more than one alleged wrong, or "primary right". In Norco, the court merely held that a state court determination of one primary right did not preclude federal court consideration of a different primary right. Appendix B, page 8, fn. 3. Thus, Norco presents no conflict.

Similarly, Sinaloa presents no conflict. Sinaloa involved no issue of res judicata. Instead Sinaloa held a federal takings claim unripe absent denial of compensation in state court, and further held that the same ripeness requirement did not apply to federal due process claims. 864 F.2d 1475 at 1481.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that the decision of the Ninth Circuit Court of Appeal was proper and should not be further reviewed.

Respectfully submitted,

JAMES K. HAHN, City Attorney
PATRICIA V. TUBERT, Deputy City Attorney
SUSAN D. PFANN, Deputy City Attorney*
Los Angeles City Attorney's Office
200 North Main Street
Room 1700, City Hall East
Los Angeles, California 90012
(213) 485-6393

DATED: February 13, 1992 *Counsel of Record

APPENDIX 1

APPENDIX 1

California Government Code § 905.1

Inverse condemnation; claim unnecessary to maintain action; procedure if claim filed.

"No claim is required to be filed to maintain an action against a public entity for taking of, or damage to, private property pursuant to Section 19 of Article I of the California Constitution.

However, the board shall, in accordance with the provisions of this part, process any claim which is filed against a public entity for the taking of, or damage to, private property pursuant to Section 19 of Article I of the California Constitution."